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SHED MEDIA US INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GILBERT J. ARENAS, JR., an individual,

Plaintiff,

v.

SHED MEDIA US INC,. a Delaware corporation; LAURA GOVAN, an individual; and DOES 1 through 10, inclusive,

Defendants.

Case No. LACV11-5279 DMG (MRWX)

DEFENDANT SHED MEDIA US INC.'S

(1) NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE PLAINTIFF'S RIGHT OF PUBLICITY CLAIMS PURSUANT TO CAL. CODE CIV. PROC. § 425.16;

(2) MEMORANDUM OF POINTS AND AUTHORITIES;

(3) DECLARATION OF ALEX DEMYANENKO;

(4) DECLARATION OF SCOTT ACORD; AND

(5) DECLARATION OF VALERIE E. ALTER

Hearing Date: August 29, 2011
Time: 10:00 a.m.
Courtroom: 7

[Proposed Order Lodged Concurrently Herewith]

[Complaint Filed: June 23, 2011]

TO THE ABOVE-CAPTIONED COURT AND TO PLAINTIFF AND HIS COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Monday, August 29, 2011, at 10:00 a.m., or as soon as possible thereafter as counsel can be heard in Courtroom 7 of the United States Courthouse, 312 North Spring Street, Los Angeles, California 90012, before the Honorable Dolly M. Gee, defendant Shed Media US Inc. will and hereby does move for an order specially striking Plaintiff Gilbert J. Arenas Jr.'s ("**Plaintiff**") claims for common law misappropriation and violation of California Civil Code § 3344 (the "**right of publicity claims**") pursuant to California Code of Civil Procedure § 425.16 (the "**anti-SLAPP statute**").

This motion is made on the grounds that Plaintiff's right of publicity claims arise out of Shed Media's actions that (1) were taken in furtherance of its First Amendment rights and (2) relate to matters of public concern. Thus, the anti-SLAPP statute applies, and Plaintiff must prove by admissible evidence that he will probably prevail on each of his claims against Shed Media. Plaintiff cannot meet that burden here as to his right of publicity claims because he cannot prove that (1) Shed Media used his name, likeness, or persona for commercial purposes and (2) even if he could prove use of his name or likeness, Shed Media's alleged use of Plaintiff's name, likeness, or persona is protected by the First Amendment to the United States Constitution.

This Motion is based upon this Notice, the attached Memorandum Of Points And Authorities, the Declaration of Scott Acord, the Declaration of Valerie E. Alter, all pleadings and other documents concerning this matter contained in the Court's file, those matters of which this Court may take judicial notice, and such further evidence and oral argument as may be presented at the hearing on this Motion.

This Motion is made following the conference of counsel pursuant to C.D. CAL. LOCAL RULE 7-3 that took place on July 26, 2011.

Dated: August 1, 2011

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By /s *James E. Curry*
JAMES E. CURRY

Attorneys for Defendant
SHEA MEDIA US INC.

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I.

INTRODUCTION

Defendant Shed Media US Inc. ("**Shed Media**") produces *Basketball Wives*, a reality television series that follows the lives of women who are or have been romantically attached to professional basketball players. The series is not about basketball, let alone basketball players. Rather, the series focuses on the women's lives and their relationships with one another, as well as their careers, personal lives, and how they have been affected by their romantic connections—past or present—to professional basketball players. Given the immense popularity of and public interest in the series—3.5 million people tuned into the premier of its third season, more than 250,000 people follow it on Twitter, and more than 350,000 people "like" it on Facebook—Shed Media is producing a spinoff, *Basketball Wives: Los Angeles* (the "**Show**"), which has not yet aired.

Plaintiff Gilbert J. Arenas, Jr. ("**Plaintiff**"), a self-described "famous" professional athlete, dated and had multiple children with defendant Laura Govan ("**Govan**"). Their relationship deteriorated in a public manner, resulting in much publicized litigation between them and Plaintiff "bashing" Govan publicly and on the radio. Govan has put her life back together and will appear on the Show. Plaintiff claims to be unhappy about Govan's appearance on the Show, and, extending his public feud with Govan, has filed this lawsuit.

Plaintiff is careful to limit his Complaint, at least at this juncture, to advertising or promotion of the Show (perhaps because the Show has not yet aired and Plaintiff lacks a good faith basis for making any claim based on the Show itself). Plaintiff even admits that the advertising and promotion of the Show as of the date that he filed his Complaint had not so much as mentioned his name. Nonetheless, the substance of Plaintiff's Complaint is that advertising for the Show impinges on his rights because the title of the Show, combined with Govan's appearance thereon, (1) misappropriates his name and likeness, (2) infringes and

dilutes his trademarks, and (3) amounts to a false endorsement. In a showing of unparalleled hubris, Plaintiff claims that he is so famous and important that simply mentioning the words "basketball wives" in the same sentence as Govan's name—even without actually mentioning Plaintiff's name—impermissibly impinges on his rights. Essentially, Plaintiff claims that because he is famous, his ex-girlfriend is not allowed to talk about ***her*** life. Plaintiff is wrong. Govan has a constitutional right to tell her story, even were it to result in an unauthorized biography of Plaintiff. *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) (plaintiff's right of publicity did not override the right of his ex-wife and onetime law enforcement partner to tell the story of their undercover work in connection with a drug investigation and ultimate fall from grace into drug use and prejury). Thus, this Court should strike Plaintiff's claims for common law misappropriation of name and likeness and violation of California Civil Code § 3344 (the "**right of publicity claims**") pursuant to the anti-SLAPP statute, California Code of Civil Procedure § 425.16.

The anti-SLAPP statute applies wherever a plaintiff attempts to state a claim arising out of actions that a defendant takes in furtherance of its right to free speech in connection with an issue of public interest and requires a plaintiff to prove that he will probably succeed on his claims. The anti-SLAPP statute clearly applies here because (1) the Show, and any advertising related thereto, is expressive content protected by the First Amendment and (2) the Show relates to an issue of pubic interest, as it provides a glimpse into the lives of women who are clearly interesting to the public, as demonstrated by the millions of people who tune into the series.[1] Thus, Plaintiff's right of publicity claims must be stricken unless he can prove that he will probably succeed on the merits of those claims. Plaintiff can make no such showing here.

[1] The second point would only be stronger if Plaintiff could somehow prove (he cannot) that the Show is about him, as it is blackprofessional athletes—including their romantic connections—present issues of public interest.

First, to state a right of publicity claim—either common law or statutory—a plaintiff must prove that the defendant used his name or likeness. Plaintiff admits that Shed Media has not actually used his name or likeness, at least as of the date that he filed his Complaint. [Complaint ¶ 24.] Plaintiff's claim that Shed Media somehow used his name or likeness by implication because it hired his ex-girlfriend, Govan, in connection with a show called *Basketball Wives,* cannot withstand even minimal scrutiny.

Moreover, Plaintiff's claims are barred by the First Amendment. A public figure's right of publicity claim must fail when he or she brings a claim based on (1) a publication in the public interest or (2) an expressive work, unless he or she can prove by clear and convincing evidence that the defendant acted with actual malice and created a false impression that the plaintiff endorsed the work. Here, as noted above, the Show and any advertising thereto is constitutionally protected as an expressive work and is also in the public interest. No reasonable person could find that the Show or any advertising related thereto falsely suggests that Plaintiff endorses the Show. Plaintiff has not appeared in the Show or in its advertising, and as of the date that his Complaint was filed, his name has not even been mentioned. No reasonable person would assume that the Show relates to him, let alone that he endorses it. Moreover, against the backdrop of Plaintiff's tumultuous relationship with Govan, anyone who knew to associate him with her would also know that her appearance does not suggest any endorsement by Plaintiff—quite the opposite. Because Plaintiff cannot prove that Shed Media created a false impression that he endorses the Show, he cannot prove that Shed Media acted with actual malice and his right of publicity claims fail. Thus, Shed Media respectfully requests that the Court grant this motion and strike Plaintiff's right of publicity claims.

II.

FACTS

A. Basketball Wives Los Angeles.

The Show is a spinoff of the successful the *Basketball Wives* series, and includes a cast of women, most of whom have or have had a romantic relationship with a professional basketball player. That said, the Show is in no way about basketball or basketball players. It is about the women's relationships with one another and their lives. [Demyanenko Decl. ¶ 5.] To the extent that basketball players are mentioned at all, they are incidental to the Show's telling its women protagonists' stories. [Demyanenko Decl. ¶ 6.]

The Show, when it airs for the first time on August 29, 2011, will follow this precedent. [Demyanenko Decl. ¶ 6, Ex. D.] The Show features Govan, who is Plaintiff's ex-girlfriend and the mother of his children. [Complaint ¶10-11, 13]

The series is incredibly popular. More than 350,000 people "like" the series on Facebook, more than 250,000 people follow the series on Twitter, and more than 3.5 million people tuned into the premier of *Basketball Wives 3* on May 30, 2011. [Acord Decl. ¶ 3, Ex. A at p. 1; Ex. B; Ex. C at 9.]

B. Promotion Of *Basketball Wives: Los Angeles.*

As of June 23, 2011, when Plaintiff filed this action, and as of the filing date of this motion, August 1, 2011, there has been minimal publicity for the Show. In fact, only two press releases have been issued, and the press releases do not even mention Plaintiff. [Acord Decl. ¶ 4.] For instance, consistent with the description of the Show, above, the first press release emphasizes that the Show is about the women:

> Elbow throwing, trash talking and in-your-face action: forget the NBA, we're talking about their wives! . . . . "Basketball Wives LA" introduces a group of dynamic women with relationships to some of the biggest basketball players in the game. "Basketball Wives LA" cast includes:

> Kimsha Artest (wife of Ron Artest, Los Angeles Lakers), Gloria Govan (fiancée of Matt Barnes, Los Angeles Lakers), ***Laura Govan (sister of Gloria Govan)*** and Jackie Christie (wife of Doug Christie, former player for the Los Angeles Clippers) and Imani Showalter (fiancée of Stephen Jackson, Charlotte Bobcats) as well as others.
>
> This 10 episode, hour-long series will dive into the real-life locker room of these leading ladies, giving viewers a never-before-seen look at what it takes to live in La La Land and be connected to a famous professional athlete. For the most part, these women live the life with the best cars, biggest mansions and hottest bling but living the high life is not all glamour and often there is a price to pay. Cameras will follow these women as they attempt to juggle their relationships, infidelity issues, children and friendships while trying to find the perfect balance between supporting their families and realizing their own career ambitions. . . .

[Acord Decl. ¶ 9, Ex. D (emphasis added).] Notably, the press release describes Govan as the "sister of Gloria Govan," not as the ex-girlfriend of Plaintiff or the mother of his children. That said, future promotional materials could certainly refer to Govan's prior relationship with Plaintiff, and as further set forth below, such use would fall well within the lines of permissible use. [*Id.*]

C. <u>Plaintiff's Complaint.</u>

Plaintiff complains that Shed Media has infringed his rights in his name and likeness. More specifically, Plaintiff alleges that he is "a professional athlete" and "one of the most well-known players in the NBA." [Complaint ¶ 9.] He further claims that by providing Govan a vehicle by which to discuss ***her life***, the Show and Shed Media enable Govan "to use, without permission or authorization, the names and/or likenesses of famous NBA professional basketball players they know on a personal level for their own commercial gain." [*Id.* ¶ 13.] Plaintiff alleges that Shed

Media chose Govan to appear on Show "primarily to enhance Defendants' ability to market the show due to Defendant GOVAN's prior personal relationship with Plaintiff and current relationship with Plaintiff as mother of the Minor Children, and thus to use Plaintiffs name and/or likeness for commercial gain, without Plaintiffs authorization." [*Id.* ¶ 14.]

In other words, Plaintiff claims that simply by virtue of Govan's appearance on the Show—regardless of whether or not his name or likeness is actually used—Shed Media has violated his rights:

> While Defendants use care to avoid explicit reference to Plaintiffs name in the advertisements for the "Basketball Wives: Los Angeles" show, the very presence of Defendant GOVAN and the title of the show is an obvious reference to Plaintiff and use of Plaintiff s likeness.

[Complaint ¶ 24.] Plaintiff also alleges "on information and belief" that Shed Media has "threatened" to use his name or likeness. [Complaint ¶ 25. *See also* Complaint ¶¶ 31, 37, 45, 50, 59.]

At least for now, Plaintiff has limited his claims to Shed Media's advertising of the Show: "The reference to Plaintiff's likeness by Defendants is primarily commercial and not communicative and not transformative, as the challenged uses are Defendants' uses of Plaintiff's likeness in the ***advertising and the promotion of*** the 'Basketball Wives: Los Angeles' show." [Complaint ¶ 17 (emphasis added).]

Based on Shed Media's use of Govan's name in its advertising and its alleged "threatened" use of Plaintiff's own name and likeness in connection with promotion of the Show, Plaintiff attempts to allege seven claims against Shed Media for: (1) trademark infringement of an unregistered mark, 15 U.S.C. § 1125(a), (2) trademark dilution, 15 U.S.C. § 1125(c), (3) false advertising, 15 U.S.C. § 1125(a), (4) false endorsement, 15 U.S.C. § 1125(a), (5) California common law misappropriation of name and likeness, (6) violation of the right of publicity, Cal. Civ. Code § 3344, and

(7) unfair competition, Cal. Bus. & Profs. Code § 17200. This motion addresses Plaintiff's right of publicity claims, the fifth and sixth claims.

III.

PLAINTIFF'S RIGHT OF PUBLICITY CLAIMS SHOULD BE STRICKEN

A. The Anti-SLAPP Statute May Be Invoked In Federal Court.

A federal court may "entertain anti-SLAPP special motions to strike in connection with state law claims." *Hilton v. Hallmark*, 580 F.3d 874 (9th Cir. 2009), *amended* 599 F.3d 894, 901 (9th Cir. 2010). Thus, Shed Media may properly move to strike Plaintiff's right of publicity claims.

B. The Anti-SLAPP Statute Is Construed Broadly.

Section 425.16 was enacted to control "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Cal. Civ. Proc. Code § 425.16(a). To achieve that goal, the Legislature has declared that "this section shall be construed broadly." *Id.* Consistent with the broad purpose of the anti-SLAPP statute, any

> cause of action against a person arising from any act of that person in furtherance of that person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Cal. Civ. Proc. Code § 425.16(b)(1). An "act in furtherance of a person's right of petition or free speech" includes "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Cal. Civ. Proc. Code § 425.16(e)(4). The anti-SLAPP statute is consistent with the policy that "[s]ummary disposition is particularly favored in cases involving First Amendment

rights." *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 752 (N.D. Cal. 1993) (citing *Okun v. Superior Court*, 29 Cal. 3d 442, 460 (1981) for the proposition that "speedy resolution of cases involving free speech is desirable to avoid a chilling effect upon the exercise of First Amendment rights").

To determine whether § 425.16 applies, a court must undertake a two-step process, as delineated in § 425.16(b). *Varian Med. Sys., Inc. v. Delfino*, 35 Cal.4th 180, 192 (2005). First, "the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal.4th 53, 67 (2002). Second, if the statute applies, the burden shifts to the plaintiff to demonstrate a probability of success on its claims. *Id.* at 67; Cal. Civ. Proc. Code § 425.16(b)(1). To meet that burden, a plaintiff must demonstrate that his complaint is legally sufficient and supported by facts sufficient to sustain a favorable judgment if the evidence submitted by plaintiff is credited. *Seelig v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 809 (2002). The motion to strike must be granted "if the evidence introduced either negates or fails to reveal the actual existence of a triable claim . . . ." *Ludwig v. Superior Court*, 37 Cal.App.4th 8, 15 (1995).

C. The Anti-SLAPP Statute Applies To Plaintiff's Right Of Publicity Claims.

Plaintiff's right of publicity claims arise entirely out of Shed Media's alleged promotion of the Show, which is protected by the First Amendment. Moreover, the Show, and Plaintiff—who himself alleges that he is a "famous" basketball player [Complaint ¶¶ 9, 30]—are undeniably issues of public interest. Thus, Plaintiff's Complaint falls within the scope of the anti-SLAPP statute.

1. The Show Is Protected By The First Amendment And Promotion And Advertising Thereof Is Similarly Protected.

Television shows, including reality television shows, are expressive works that fall within the protection of the First Amendment. *See, e.g., Daly v. Viacom,*

Inc., 238 F. Supp. 2d 1118, 1123 (N.D. Cal. 2002) ("*Bands on the Run* is an expressive work protected by the First Amendment"); *Baugh*, 828 F. Supp. at 754 (*Street Stories* reality television program protected by the First Amendment); *Aaronson v. Dog Eat Dog Films*, 738 F. Supp. 2d 1104, 1111 (W.D. Wash. 2010) ("It is beyond dispute that documentary movies involve free speech."); *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 410 (2000) ("Entertainment features receive the same constitutional protection as factual news reports."). The fact that a television show is produced for profit does not change this conclusion, nor does it transform the show into commercial speech that is entitled to lesser constitutional protection. *Hicks v. Casablanca Records*, 464 F. Supp. 426, 432 (S.D.N.Y. 1978) (movies and books are "are a constitutionally protected form of expression notwithstanding that their production, distribution and exhibition is a large-scale business conducted for private profit" (internal quotations omitted)). This is true even where the work features a celebrity and intends to use that feature to increase its circulation. As the Ninth Circuit explained in holding that an article featuring actor Dustin Hoffman (but unauthorized by him) and designed to draw attention to *Los Angeles Magazine* was protected by the First Amendment,

> A printed article meant to draw attention to the for-profit magazine in which it appears, however, does not fall outside of the protection of the First Amendment because it may help to sell copies. While there was testimony that the Hollywood issue and the use of celebrities was intended in part to "rev up" the magazine's profile, that does not make the fashion article a purely "commercial" form of expression.

Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1186 (9th Cir. 2001).

Moreover, where an underlying work is protected by the First Amendment, advertising and promotional materials for the work are also protected. *Cher v. Forum Intern., Ltd.*, 692 F.2d 634, 639 (9th Cir. 1982) ("Constitutional protection extends to the truthful use of a public figure's name and likeness in advertising

which is merely an adjunct of the protected publication and promotes only the protected publication." (citing *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 781-72 (1979)); *Daly*, 238 F. Supp. 2d at 1123 ("As *Bands on the Run* is an expressive work protected by the First Amendment, plaintiff cannot state a misappropriation claim based on the use of her likeness in the program or the advertisements for the program."); *Gionfriddo*, 94 Cal. App. 4th at 414 ("If a video documentary contains an unconsented, though protected, use of a person's likeness, there is little question that an advertisement for the documentary, containing a clip of that use would be permissible."); *Montana v. San Jose Mercury News, Inc.*, 34 Cal.App.4th 790, 797 (1995) ("a newspaper has a constitutional right to promote itself by reproducing its originally protected articles or photographs.").

Here, Plaintiff's claims arise out of Shed Media's alleged promotion of the Show. Because the Show—which provides a real-life look at the lives of women who are or have been romantically attached to basketball players—is an expressive work that is undeniably entitled to First Amendment protection, any advertising thereof is also protected. Thus, Plaintiff's claims fall within the scope of the anti-SLAPP statute.

2. <u>The Show And Shed Media's Promotion Thereof Is An Issue Of Public Interest.</u>

The Show involves a topic of widespread interest and Plaintiff's pleading establishes he is a public figure. The mandate for broad construction of the anti-SLAPP statute applies with particular force to the determination of what constitutes a public issue or an issue of public interest. The anti-SLAPP statute was amended in 1997 to include a mandate of broad construction largely in response to *Zhao v. Wong*, 48 Cal.App.4th 1114 (1996), which narrowly defined what "public issues" would justify the application of the anti-SLAPP statute. *See Integrated Healthcare Holdings, Inc., v. Fitzgibbons*, 140 Cal.App.4th 515, 523 (2006) (1997 amendments to the anti-SLAPP statute requiring broad construction were adopted in response to

Zhao); *Nygård v. Uusi-Kerttula*, 159 Cal.App.4th 1027, 1039-1042 (2008) (same); *Briggs v. Eden Council For Hope & Opportunity*, 19 Cal.4th 1106, 116 (1999) ("*Zhao* is incorrect in its assertion that the only activities qualifying for statutory protection are those which meet the lofty standard of pertaining to the heart of self-government.").

Thus, "matters in the public interest are not restricted to current events; magazines and books, radio and television may legitimately inform and entertain the public with the reproduction of past events, travelogues and biographies." *Dora v. Frontline Video, Inc.*, 15 Cal.App.4th 536, 543 (1993) (internal quotations omitted). *See also Nichols v. Moore*, 334 F. Supp. 2d 944, 956 (E.D. Mich. 2004) ("The scope of the subject matter which may be considered of 'public interest' or 'newsworthy' has been defined in the most liberal and far-reaching terms. The privilege of enlightening the public is by no means limited to dissemination of news in the sense of current events but extends far beyond to include all types of factual, educational, and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general." (internal citations omitted)). Rather, "'an issue of public interest' . . . is ***any issue in which the public is interested***. In other words, the issue need not be 'significant' to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes interest." *Nygård,* 159 Cal.App.4th at 1042 (emphasis original). There is no need that an issue of public interest "involve questions of civic concern; social or even low-brow topics may suffice." *Hilton*, 599 F.3d at 905 (greeting card featuring celebutante Paris Hilton in the public interest). Thus, to meet the public interest prong of the anti-SLAPP statute, it is enough that (1) "[t]he subject of the statement or activity precipitating the claim was a person or entity in the public eye;" (2) "[t]he statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants;" or (3) "[t]he statement or activity precipitating the claim involved a topic of widespread, public interest." *Commonwealth Energy v. Investor Data*

Exchange, 110 Cal. App. 4th 26, 33 (2003).[2] Applying these standards, it is clear that the Show and related promotion are connected to a issue of public interest.

a. The Show Involves A Topic Of Widespread Interest.

Courts have repeatedly recognized that works providing insight into a particular subculture are within the public interest. For example, in *Chapman v. Journal Concepts, Inc.*, the court explained:

> Johnson's tale of his interactions with Plaintiff – including Plaintiff's quirky mannerisms, quips, and colorful history – sheds light on one of surfing's more intriguing personalities and, by extension, on the sport and culture itself. The August/September 2006 volume of *The Surfer's Journal* captures a sliver of the surfing subculture, fleshes out our impression of a legend of the sport, illuminates the difficulties that may arise when doing business in the surfing community, and provides insight into the fast-growing and highly profitable board shaping market. The published article, photographs, and liner notes are newsworthy and relevant.

528 F. Supp. 2d 1081, 1097-98 (D. Hi. 2007). *See also Dora*, 15 Cal. App. 4th at 543 (noting that a documentary was in the "public interest" where it was "about a certain time and place in California history and, indeed, in American legend. The

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[2] Shed Media asserts that the test set forth in *Commonwealth* is correct. Nonetheless, it acknowledges that the Third District of the California Court of Appeal enunciated a slightly different test in *Weinberg v. Feisel*, 110 Cal. App. 4th 1122 (2003), which was designed to ensure that a private controversy between famous people would not trigger the anti-SLAPP statute, even if the controversy was of interest to the public. *See Hilton*, 599 F.3d at 906. The distinction between the tests set forth in *Commonwealth* and *Weinberg* are purely academic in this case because Arenas does not claim that the advertising or promotion for the Show publicizes a private controversy between famous people. Instead, Plaintiff alleges that it is so public that any mention of Govan in connection with the Show is a *de facto* mention of Plaintiff. [*See, e.g.*, Complaint ¶ 24.] Moreover, if a simple greeting card featuring Paris Hilton saying her signature phrase, "that's hot", meets both the *Commonwealth* and *Weinberg* tests, then surely a television show detailing the lives of a series of women and related advertising meets both tests, too.

people who were a part of that era contributed, willingly or unwillingly, to the development of a life-style that has become world-famous and celebrated in popular culture.").

The Show, like the works at issue in *Dora* and *Chapman*, provides a glimpse into a particular subculture: the community of women living what the public perceives to be glamorous lifestyles by virtue of their relationships—past or present—to basketball players. [Demyanenko Decl. ¶ 3, Ex. D.] The Show's advertising provides a similar, albeit brief, glimpse into the lives of its women protagonists. [*Id.*, Ex. D (June 20, 2011 press release noting that "these women live the life with the best cars, biggest mansions and hottest bling but living the high life is not all glamour and often there is a price to pay. Cameras will follow these women as they attempt to juggle their relationships, infidelity issues, children and friendships while trying to find the perfect balance between supporting their families and realizing their own career ambitions. . . .").] By elucidating this snippet of American popular culture, the Show and related advertising are no doubt in the public interest and of interest to the public. This is clear from the fact that more than 350,000 people "like" Basketball Wives on Facebook, more than 250,000 people follow it on Twitter, and more than 3.5 million people tuned into the premier of the third season of *Basketball Wives* when it aired on May 30, 2011. [*Id.*, Exs. A-C.] Plaintiff's right of publicity claims, which arise out of Shed Media's alleged use of his name and/or likeness in connection with the Show's advertising, thus fall within the scope of the anti-SLAPP statute.

b. Plaintiff's Pleading That He Is Famous And One Of The Most Well-Known Players In The NBA Establishes The Applicability Of The Anti-Slapp Statute.

"[T]here is a public interest which attaches to people who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities." *Eastwood v. Superior Court*,

149 Cal.App.3d 409, 422 (1983) (considering the "public interest" in the context of a First Amendment defense). This public interest extends beyond such people's professional accomplishments and to their personal lives. *Id.* at 423 ("We have no doubt that the subject of the Enquirer article — the purported romantic involvements of Eastwood with other celebrities — is a matter of public concern"); *Michaels v. Internet Entertainment Group, Inc.*, No. 98-583, 1998 U.S. Dist. LEXIS 20786 (C.D. Cal. Sept. 10, 1998) ("It is clearly established that the romantic connections of celebrities are newsworthy, as are business disputes and litigation arising therefrom."); *Lee v. Penthouse International, Ltd.*, No. 96-7069, 1997 U.S. Dist. LEXIS 23893 at * 15(C.D. Cal. March 18, 1997) ("If Clint Eastwood's sexual relations with Tanya Tucker and Sandra Locke are newsworthy, then the sex life of Tommy Lee and Pamela Anderson Lee is also a legitimate subject for an article by *Penthouse*."). In fact, a cause of action arising out of a publication protected by the First Amendment may be considered in the public interest simply because it features a celebrity. *Hilton*, 599 F.3d at 907-908 (greeting card featuring Paris Hilton arises out of the public interest); *Commonwealth*, 110 Cal.App.4th at 33 (public interest test met where "[t]he subject of the statement or activity precipitating the claim was a person or entity in the public eye").

Plaintiff claims that he "is a professional athlete" and "one of the most well-known players in the NBA." [Complaint ¶ 9.] He further claims to be famous. [*Id.* ¶ 30.] With these allegations, Plaintiff alleges that he falls within the category of people "who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities." *Eastwood*, 149 Cal.App.3d at 422. His Complaint is based entirely on Shed Media's alleged references to his personal life. [*See, e.g.*, Complaint ¶ 24 (alleging that the presence of Govan on the Show and its title "is an obvious reference to Plaintiff" and his personal relationship with Govan), ¶ 39 (alleging in a false advertising claim incorporated into his right of publicity claims "the entire premise of the show is to

entice viewers and potential viewers to watch the program by suggesting or encouraging them to believe that they may thus learn 'insider' or confidential facts and information about NBA players such as Plaintiff").] Thus, Plaintiff's Complaint arises out of conduct in connection with an issue of public interest, and the anti-SLAPP statute applies.

D. Plaintiff Cannot Establish A Probability Of Success On His Right Of Publicity Claims.

Because his right of publicity claims fall within the scope of the anti-SLAPP statute, Plaintiff must prove that he will probably succeed on those claims. Plaintiff can not carry this burden because there has been no actual use, and if there were a use in connection with the expressive work, it would be protected by the First Amendment. To prevail on a common law right of publicity claim, a plaintiff must establish: (1) the defendant's use of the plaintiff's identity; (2) the appropriation of the plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury. *See Gionfriddo*, 94 Cal. App. 4th at 408; *Eastwood*, 149 Cal. App. 3d at 417-418. To prevail on a statutory claim under § 3344, a plaintiff must also establish that: (5) the defendant knowingly used plaintiff's name, photograph, or likeness on or in products, merchandise, or goods, or for purposes of advertising or solicitation of purchases; and (6) there is a direct connection between the use and the commercial purpose. *See Eastwood*, 149 Cal. App. at 416 n.6 (9183) ("Section 3344 . . . requires a knowing use whereas under the case law, mistake and inadvertence are not a defense against commercial appropriation use . . . ."); *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal. App. 4th 318, 322 (1997) (stating that "[a]ppellant maintains that he can proceed with a common law claim for invasion of privacy as well as a claim under Civil Code section 3344 because respondents exploited his name and likeness for commercial gain . . . . To succeed in his claims, appellant must establish a direct connection between the use of his name or likeness and a commercial purpose.").

Plaintiff cannot prevail on his right of publicity claims because (1) Plaintiff has not alleged any use of *his*, as opposed to *Govan's*, name or likeness and (2) the use of his name and image in connection with an expressive work such as the Show would not constitute a common law or statutory violation and the use would be protected by the First Amendment.

1. Shed Media Did Not Use Plaintiff's Name, Likeness, Or Persona.

Plaintiff cannot meet the first element of either a statutory or a common law right of publicity claim: "use" of his name or likeness. "Use" of a name or likeness for purposes of § 3344 has been strictly construed to mean use of the *plaintiff's* name or likeness, not use of *someone else's* name or likeness. *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (no violation of § 3344 where "[t]he defendants did not use Midler's name or anything else whose use is prohibited by the statute. The voice they used was Hedwig's, not hers."). *See also White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992) ("Samsung and Deutsch used a robot with mechanical features, and not, for example, a manikin molded to White's precise features. Without deciding for all purposes when a caricature or impressionistic resemblance might become a 'likeness,' we agree with the district court that the robot at issue here was not White's 'likeness' within the meaning of section 3344."). Here, Plaintiff himself pleads that "Defendants use care to avoid explicit reference to Plaintiff's name in the advertisements for the" Show, and attempts to state a claim based on Shed Media's use of *Govan's* name. [Complaint ¶ 24.] Plaintiff cannot seriously contend that *Govan's* name is *his* name, or that he has any right to control Govan's use of her own name. Thus, he fails to allege a use for purposes of § 3344, and Shed Media's anti-SLAPP motion should be granted.

Plaintiff's common law right of publicity claim fails for the same reason, even with the looser "use" standard applied to common law right of publicity claims. *See White*, 971 F.2d at 1398 (noting that a common law right of publicity cause of action

attaches to the more amorphous misappropriation of "the plaintiff's identity"). Plaintiff claims that the Show's use of Govan's name, in combination with the title of the Show, "is an obvious reference to Plaintiff and use of Plaintiff's likeness." [Complaint ¶ 24.] In other words, Plaintiff claims that he is so famous that any reference to Govan in the context of a television show amounts to a reference to him and an unlawful appropriation of his name or likeness. Plaintiff apparently believes that his fame permits him to prevent Govan from using *her name* in connection with anything—a television show with the word "basketball" in the title, girls' basketball shoes, or even basketball shaped cookies—because she used to date him and he is a famous basketball player. No case—not even *White*, which represents the outer limits of the common law right of publicity—supports the extreme stretch of the law requested in Plaintiff's Complaint, and no reasonable person could find that the combination of the Show's title and Govan's appearance in the Show constitutes a misappropriation of Plaintiff's name or likeness. Thus, Plaintiff cannot prevail on his claim for violation of the common law right of publicity, either, and Shed Media's anti-SLAPP motion should be granted.

2. Use of Plaintiff's Name or Likeness In the Context Of This Expressive Work Is Protected The First Amendment To The United States Constitution.

Even if (1) Plaintiff could persuade this Court that the combination of the Show's title and Govan's appearance on the Show constituted a use of Plaintiff's name or likeness or (2) Shed Media were to refer to Plaintiff in a press release or other advertising, as it did with other basketball players mentioned in the June 20, 2011 press release, Plaintiff's claims would still fail. As discussed above in addressing the applicability of the anti-SLAPP statute, the Show and any advertising thereof is protected by the First Amendment. Thus, Plaintiff cannot maintain his right of publicity claims unless he proves that Shed Media acted with actual malice. Plaintiff can make no such showing here.

a. The Show And Related Advertising Are Protected By The First Amendment.

The California Supreme "Court has acknowledged that 'the right of publicity has not been held to outweigh the value of free expression. Any other conclusion would allow reports and commentaries on the thoughts and conduct of public and prominent persons to be subject to censorship under the guise of preventing the dissipation of the publicity value of a person's identity.'" *Cher*, 962 F.2d at 638 (quoting *Gugliemi*, 25 Cal. 3d at 873)). The First Amendment defense to a right of publicity claim has been described in two ways: (1) a defense based on the publication of matters in the public interest, and (2) a defense based on the publication of an expressive work. Both of these formulations apply here, and act to bar Plaintiff's right of publicity claims.

(1) The Show Relates To Matters In The Public Interest.

There is an inherent "tension between the broad definition of commercial appropriation under California law and the values protected by the First Amendment." *Lee*, 1997 U.S. Dist. LEXIS 23893 at *11. To resolve this tension, the California courts have long held that, as a matter of First Amendment jurisprudence, that "[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it, is not ordinarily actionable." *Dora*, 15 Cal. App. 4th at 542 (internal citations omitted).

The California legislature codified this exception in § 3344(d), which provides that "a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a)." *Lee*, 1997 U.S. Dist. LEXIS 23893 at *11 (quoting § 3344(d)). The terms "news" and "public affairs" as used in § 3344(d) are coextensive with the protection of the publication of matters of "public interest" in connection with common law claims. *Montana*, 34 Cal. App. 4th at 793 ("Like the common law

cause of action, the statutory cause of action specifically exempts from liability the use of a name or likeness in connection with the reporting of a matter in the public interest."); *Dora*, 15 Cal. App. 4th at 546; *Eastwood*, 149 Cal. App. 4th at 421. Thus, a publication is exempt from liability under either the common law or statutory framework where it touches upon an issue of public interest.

As noted in the discussion of the applicability of the anti-SLAPP statute, "matters in the public interest are not restricted to current events; magazines and books, radio and television may legitimately inform and entertain the public with the reproduction of past events, travelogues and biographies." *Dora*, 15 Cal. App. 4th at 543 (internal quotations omitted). This public interest may attach to particular people, "who, by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities." *Eastwood*, 149 Cal.App.3d at 422. These people include "actors and actresses, ***professional athletes***, [and] public officers. . . ." *Gionfriddo*, 94 Cal. App. 4th at 410 (emphasis added).

Moreover, the public interest defense is not limited to the traditional news media. "The California courts have consistently held that newsworthiness is not limited to high-minded discussion of politics and public affairs." *Michaels*, 1998 U.S. Dist. LEXIS 20786 at 12. Instead, newsworthiness encompasses publications made purely for "amusement." *Id.* (quoting *Shulman v. Group W Productions, Inc.*, 18 Cal. 4th 200, 225 (1998)). *See also Moore*, 334 F. Supp. 2d at 956 ("The scope of the subject matter which may be considered of 'public interest' or 'newsworthy' has been defined in the most liberal and far-reaching terms. The privilege of enlightening the public is by no means limited to dissemination of news in the sense of current events but extends far beyond to include all types of factual, educational, and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general." (internal citations omitted)). Thus, the Courts have found a wide spectrum of publications—including *Playgirl* magazine, an

article in *The Surfer's Journal* about an "iconic figure in the surfing world," an article in *Penthouse* magazine featuring sexually explicit photos of Pamela Anderson of *Baywatch* fame, a tabloid news show also featuring portions of a sex tape of Anderson, and a portion of a reality television show depicting a victim's rights advocate talking to a victim of domestic abuse—to be newsworthy or within the public interest. *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1098 n. 8 (9th Cir. 2002) ("We do not accept Solano's argument that Playgirl is not a news magazine and thus cannot contain content that may be deemed newsworthy. Even 'vulgar' publications are entitled to such guarantees . . . . Courts are, and should be, reluctant to define newsworthiness." (internal quotations omitted)); *Chapman*, 528 F. Supp. 2d at 1097-98 ("The August/September 2006 volume of *The Surfer's Journal* captures a sliver of the surfing subculture, fleshes out our impression of a legend of the sport, illuminates the difficulties that may arise when doing business in the surfing community, and provides insight into the fast-growing and highly profitable board shaping market. The published article, photographs, and liner notes are newsworthy and relevant."); *Lee*, 1997 U.S. Dist. LEXIS 23893 at *15 ("the sex life of Tommy Lee and Pamela Anderson Lee is also a legitimate subject for an article by Penthouse"); *Michaels*, 1998 U.S. Dist. LEXIS 20786 at *13 (broadcast of Pamela Anderson sex tape on a tabloid news show was constitutionally protected because "[i]t is clearly established that the romantic connections of celebrities are newsworthy, as are business disputes and litigation arising therefrom"); *Baugh*, 828 F. Supp. at 754 (constitutional privilege applies where "Defendants videotaped and broadcast an actual event that occurred at Plaintiffs' home [counsel of domestic abuse victim]. In addition, while STREET STORIES is not a traditional news show, it is plainly a 'news or public affairs' broadcast in the broad sense and is therefore entitled to protection.").

Against this backdrop, it is clear that the Show is in the public interest and therefore privileged under the First Amendment and § 3344(d). The Show follows

the lives of women who are, or at one point were, romantically connected to basketball players "as they attempt to juggle their relationships, infidelity issues, children and friendships while trying to find the perfect balance between supporting their families and realizing their own career ambitions." [Acord Decl. ¶ 9, Ex. D.] The Show is thus privileged because professional athletes and the auras and subcultures surrounding them—including their love lives—are issues of public interest. *Gionfriddo*, 94 Cal. App. 4th at 410; *Dora*, 15 Cal. App. 4th at 543, 546; *Eastwood*, 149 Cal.App.3d at 423; *Lee*, 1997 U.S. Dist. LEXIS 23893 at *15; *Michaels*, 1998 U.S. Dist. LEXIS 20786 at *13; *Chapman*, 528 F. Supp. 2d at 1097-98.

This conclusion is buttressed by the fact that the Show, like the reality television program at issue in *Baugh*, videotapes and broadcasts actual events that take place its women protagonists' lives. *Baugh*, 828 F. Supp. at 754. Those women—including Govan—have a right to tell *their* stories, even if they might mention the professional athletes with whom they are or once were romantically connected. Plaintiff cannot seriously contend that he has the right to prevent Govan from telling her story simply because he is famous and at one time played a role in her life. Govan has a constitutional right to tell her story, even if it results in an unauthorized biography of Plaintiff. *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1994) (plaintiff's right of publicity did not override the right of his ex-wife and onetime law enforcement partner to tell the story of their undercover work in connection with a drug investigation and ultimate fall from grace into drug use and prejury).

(2) <u>The Show Is An Expressive Work.</u>

"Under the First Amendment, a cause of action for appropriation of another's name and likeness may not be maintained against expressive works, whether factual or fictional. Whether the publication involved was factual and biographical or fictional, privacy rights have not been held to outweigh the value of free

expression." *Daly*, 238 F. Supp. 2d at 1123 (internal quotations and citations omitted) (citing *Gugliemi*, 25 Cal. 3d at 871-72). Moreover, it is "beyond dispute" that documentary movies and television—including reality television—are expressive works entitled to First Amendment protection. *Aaronson*, 738 F. Supp. 2d at 1111 (citing *Dora*, 15 Cal. App. 4th at 544-46); *Daly*, 238 F. Supp. 2d at 1123 (reality show *Bands on the Run* protected by the First Amendment as an expressive work). The Show—a reality television show—is undeniably an expressive work that is protected by the First Amendment. Thus, and Plaintiff cannot maintain his right of publicity claims against Shed Media based on it.

(3) Because The Show Is Protected By The First Amendment, Related Advertising Is Similarly Protected.

As noted above in discussing the applicability of the anti-SLAPP statute, where an underlying work that makes use of another's name or likeness is entitled to First Amendment protection, advertising for the work is also protected. *See Cher*, 962 F.2d at 638; *Daly*, 238 F. Supp. 2d at 1123; *Gionfriddo*, 94 Cal. App. 4th at 414; *Montana*, 34 Cal. App. 4th at 796-97. Just as a plaintiff cannot maintain a cause of action against an expressive work because it is protected by the First Amendment, he cannot maintain a cause of action against advertising for the expressive work. *Cher*, 692 F.2d at 639 ("Advertising to promote a news medium, accordingly, is not actionable under an appropriation of publicity theory"); *Daly*, 238 F. Supp. 2d at 1123 ("As *Bands on the Run* is an expressive work protected by the First Amendment, plaintiff cannot state a misappropriation claim based on the use of her likeness in the program or the advertisements for the program."). Thus, the fact that Plaintiff here has limited his claims to alleged "uses of Plaintiff's likeness in the advertising and the promotion of the 'Basketball Wives: Los Angeles' show" [Complaint ¶ 17] does not change the fact that his claims are barred by the First Amendment.

b. Plaintiff Cannot Prove That Shed Media Acted With Actual Malice.

Because Plaintiff, allegedly "famous" and a public figure [Complaint ¶ 30], attempts to state right of publicity claims based on advertising and promotion for the Show that is protected by the First Amendment, Plaintiff must prove ***by clear and convincing evidence*** that Shed Media acted with actual malice in advertising the Show. *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664 (2010) ("We conclude a defendant publisher may assert that the actual malice standard applies to claims for commercial misappropriation, whether the claims are brought under the common law or under Civil Code section 3344."); *Hoffman*, 255 F. 3d at 1187 (a plaintiff must prove actual malice by "clear and convincing evidence," which is a "heavy burden, far in excess of the preponderance sufficient for most civil litigation"); *Cher*, 692 F.2d at 639 (defendant not liable for constitutionally protected advertising unless the plaintiff shows that the defendant acted with reckless disregard for the truth). Actual malice

> does not mean ill will or 'malice' in the ordinary sense of the term. . . . Actual malice, instead, requires . . . that the statements were made with a reckless disregard for the truth. And although the concept of 'reckless disregard' 'cannot be fully encompassed in one infallible definition,' we have made clear that the defendant must have made [the decision to publish] with a 'high degree of awareness of . . . probable falsity,' or must have 'entertained serious doubts as to the truth of his publication.'"

Eastwood v. National Enquirer, Inc., 123 F.3d 1249, 1251 (9th Cir. 1997) (quoting *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 666-67 (1989) and alterations in original). *See also Hoffman*, 255 F. 3d at 1187 ("Hoffman, a public figure, must therefore show that LAM, a media defendant, acted with 'actual malice,' that is, with knowledge that the photograph was false, or with reckless disregard for its falsity."). Thus, in this case, Plaintiff cannot prevail unless he can prove that

Shed Media, in advertising the show, "knowingly or recklessly falsely claimed that [he] endorses" it. *O'Neil & Co., Inc. v. Validea.com Inc.*, 202 F. Supp. 2d 1113, 1120 (C.D. Cal. 2002).

No reasonable person could conclude that the advertising for the Show falsely claims that Plaintiff endorses the Show simply because Govan appears in the Show, and might mention him on the Show as her ex-boyfriend and the father of her children: "Newspapers and magazines commonly use celebrities' names and photographs without making endorsement contracts, so the public does not infer an endorsement agreement from the use." *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407 (9th Cir. 1996). The same is true of television shows. No reasonable person would believe that Plaintiff endorses that Show simply because someone mentions that Govan is Plaintiff's ex-girlfriend and the mother of his children.

Plaintiff's claim that the title of the Show—*Basketball Wives*—and Govan's appearance thereon suggests endorsement by him [Complaint ¶¶ 24, 45] is equally meritless. Titles do not point to the source or supporter of an expressive work:

> A title is designed to catch the eye and to promote the value of the underlying work. Consumers expect a title to communicate a message about the book or movie, but they do not expect it to identify the publisher or producer. If we see a painting titled 'Campbell's Chicken Noodle Soup,' we're unlikely to believe that Campbell's has branched into the art business. Nor, upon hearing Janis Joplin croon 'Oh Lord, won't you buy me a Mercedes-Benz?,' would we suspect that she and the carmaker had entered into a joint venture. A title tells us something about the underlying work but seldom speaks to its origin.

Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 902 (9th Cir. 2002) (internal citations omitted). Similarly, a television show called *Basketball Wives* is unlikely to make anyone believe that Plaintiff has entered into the television business.

The fact that no reasonable person could believe that Plaintiff endorses the Show is especially true in light of Plaintiff's publicly tumultuous relationship with Govan, which has been well covered by media outlets from the *Washington Post* to the *Chicago Sun Times* to the sports blog www.deadspin.com. For example, it has been reported that in February 2011, (1) Govan served Plaintiff with child support papers during half time of a basketball game as he walked into the locker room and (2) Plaintiff "blasted" Govan on a radio show. [Alter Decl. ¶¶ 2-5, Exs. E-G.] Thus, anyone who knows enough about Govan to know that she is Plaintiff's ex-girlfriend would also know that an appearance by Govan does not suggest an endorsement from Plaintiff. In fact, it more likely suggests the opposite. Thus, Plaintiff cannot possibly meet his "heavy burden" of proving that Shed Media acted with actual malice.

IV.

CONCLUSION

For the reasons explained above, Shed Media respectfully requests that the Court grant its special motion to strike and strike Plaintiff's right of publicity claims.

Dated: August 1, 2011

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